A

JABATAN KESIHATAN DAN KESELAMATAN PEKERJAAN

v.

SRI KAMUSAN SDN BHD

B

HIGH COURT SABAH & SARAWAK, SANDAKAN
DOUGLAS CRISTO PRIMUS SIKAYUN JC
[CASE NO: SDK-42 AC-1-4-2013]
22 NOVEMBER 2013

C

LABOUR LAW: *Employment - Employer's liability - Employer's duty to provide safe working environment for employee - Employee died due to fall from tractor - Whether deceased exposed to risk - Whether incident occurred during working hours - Whether there was causal nexus between*
D *employer's breach and risk to deceased's safety - Whether employer rebutted duty imposed under s. 60 of OSHA on balance of probabilities - Occupational Safety and Health Act 1994, s. 15(1)*

E

The Department of Occupational Safety and Health received a complaint which involved Junaidi ('deceased') who died while he was sitting on top of the tractor wheel cover and fell off from the tractor. The respondent was the employer of the deceased and was charged under s. 15(1) of the Occupational Safety and Health Act 1994 ('OSHA'). At the end of the defence case, the Sessions
F Court Judge ('SCJ') discharged and acquitted the respondent. Hence, the appeal. The appellant submitted that the tractor and trailer provided by the respondent as transportation for the employees to the workplace were unsafe. The trailer was not provided with proper seating or canopy as the workers had to sit
G on the floor of the trailer and this was not in accordance with s. 15 of the Code of Practice on Safety and Health Agriculture issued by the International Labour Organisation (COPSHA-ILO). The appellant relied on the evidence of an officer from the Road Transport Department ('PW6') and an officer from Forensic
H Engineering Division of DOSH ('PW7') to support their contention that the tractor and trailer were not safe and unsuitable to transport workers in the plantation. The main issues in this appeal were: (i) whether the appellant had proven its case beyond reasonable doubt against the respondent; (ii) whether the
I respondent's defence had rebutted the duty imposed under s. 60 of the OSHA on the balance probabilities.

Held (dismissing appeal; affirming decision of Sessions Court): A

(1) The deceased was not working at the material time and there was no work carried out. Thus, the activity done by the deceased was not an activity that could be described as part B of the employer's undertaking as they are free to do whatever they liked after working hours. As such, the respondent could not be held liable for acts that took place after the work hours of the deceased. Therefore, the SCJ was correct in finding that the prosecution had failed to prove beyond C reasonable doubt the deceased was at work. (paras 13 & 14)

(2) Since the deceased was not at work at the material time, the tractor and the trailer was not used by the deceased as a mode of transportation to his place of work. PW6 admitted D that he was not specialised in the field of agriculture and he was not in the position to give opinion as to the use of equipments in the plantation. PW7 also admitted that he was not an expert in so far as to the use of the tractor and trailer in agriculture to qualify as an expert in that field. Therefore, E PW6 and PW7 were not expert witnesses and their evidence was of no assistance. (paras 15 & 19)

(3) Being a statutory body, DOSH had the statutory duty under s. 48 of the OSHA to prohibit the use of the trailers after the accident if DOSH was of the opinion that the trailer was not F safe. However, this was not done. By not issuing such notices, it could be inferred that the trailer was safe and the use of it does not risk the lives of the employees. As such, the prosecution had failed to prove beyond reasonable doubt that the tractor and the trailer was not safe to be used to ferry G workers in the plantation. (paras 20 & 22)

(4) There were safety regulations of the respondent which the workers were briefed and disciplinary actions were taken against workers who breached the rules and regulations on H safety. Therefore, the SCJ was right in holding that the respondent had taken all the reasonable steps and due diligence to ensure the safety of each worker at the plantation and any hazardous foreseeable danger had been taken precaution by the respondent by putting up warning signage I at the vicinity. Therefore, the respondent had rebutted the duty imposed as stated under s. 60 of the OSHA. (paras 24, 26, 27 & 28)

Case(s) referred to:
DPP v. PJ Carey (Contractors) Limited [2011] IECCA 63 ***(refd)***
Her Majesty The Queen v. Jamel Metals Inc [1999] CanLII 12390 SK PC ***(refd)***
Inspector John Sibilant v. Royal Automobile Club of Australia Incorporating Imperial Services Club Ltd [2008] NSWIRComm 87 ***(foll)***
R v. Gateway Foodmakers Ltd [1996] EWCA Crim 1786 ***(foll)***
Tesco Supermarkets Ltd v. Nattrass [1972] AC 153 ***(refd)***
Utumapu (Health and Safety Inspector) v. W Crighton & Son Ltd (NZDC Palmerston North) [2000] NZHSE 14 ***(refd)***
WorkCover Authority of New South Wales (Inspector Woodington) v. Australand Holding Limited and Sassall Glass & Joinery Pty Limited [2008] NSWIRComm 153 ***(refd)***

Legislation referred to:
Occupational Safety and Health Act 1994, ss. 3, 15(1), 48, 55, 60
Health and Safety at Work Act 1974 [UK], s. 2(1)
Occupational Health and Safety Act [AU], s. 8(1)

For the prosecution - Natrah Mazman; DPP
For the respondent - Francis Wong; M/s William Liaw, Chan & Co; Advocs

Reported by Sandra Gabriel

JUDGMENT

Douglas Cristo Primus Sikayun JC:

[1] This is an appeal by the appellant against the order of the learned Sessions Court Judge (SCJ) in discharging and acquitting the respondent at the end of the defence case for an offence under s. 15(1) of the Occupational Safety and Health Act 1994 ('OSHA').

[2] The brief facts of the case is that on 6 October 2010, the Department of Occupational Safety and Health ('DOSH') received a complaint about an incident occurred at Sri Kamusan on 5 October 2010, about 5pm. On 7 October 2010, two officers from DOSH went to Sri Kamusan estate to conduct accident investigation. From their initial investigation, it was found out that:

(i) The accident involved one victim, that was the late Junaidi bin Maswan (the deceased);

(ii) Before the accident, the deceased was sitting on the top of the tractor's wheel cover, and fell off from the tractor when the tractor passed through a sharp bend;

(iii) The deceased worked for Sri Kamusan Sdn Bhd (respondent);

(iv) The respondent had failed to supervise the use of tractor as a means of transportation of workers to the workplace, causing the deceased to ride on the said tractor and consequently fell off the tractor when the tractor passed through a sharp bend. The deceased was pronounced dead at 6.45pm on 5 October 2010.

[3] The respondent was then charged in court and the amended charge read as follows:

> Bahawa kamu, pada 05 Oktober 2010, lebih kurang jam 5:00 petang di Phase 3, Sri Kamusan Estate, Locked Bag 34, 90009 Sandakan, Sabah sebagai majikan, telah gagal untuk menjalankan tanggungjawab kamu sebagai yang dikehendaki di bawah seksyen 15(1), Akta Keselamatan dan Kesihatan Pekerjaan 1994 iaitu gagal untuk memastikan setakat yang praktik, keselamatan, kesihatan dan kebajikan semasa bekerja semua pekerja kamu, semasa bekerja, iaitu traktor dan trailer yang disediakan sebagai pengangkutan pekerja khususnya Junaidi bin Maswan (No paspot: AN 854348) tidak selamat untuk digunakan ke tempat kerja. Dengan itu, kamu telah lakukan kesalahan di bahawa seksyen 15(1) Akta Keselamatan dan Kesihatan Pekerjaan 1994 dan jika disabitkan kesalahan boleh dihukum di bawah seksyen 18 Akta yang sama.

[4] Section 15(1) of OSHA reads:

> It shall be the duty of every employer and every self-employed person to ensure so far as is practicable, the safety, health and welfare at work of all his employees and that duty extends to:
>
> a) The provision and maintenance of plant and systems of work that are, so far as is practicable, safe and without risks to health;
>
> b) The making of arrangement for ensuring, so far as is practicable, safety and absence of risks to health in connection with the use of operation, handling, storage and transport of plant and substances;

A

c) The provision of such information, instruction, training and supervision as is necessary to ensure, so far as is practicable, the safety and health at work of his employees;

d) So far as is practicable, as regards any place of work under the control of employer or self-employed person, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of the means of access to and egress from it that are safe and without such risks;

e) The provision and maintenance of a working environment for his employees that is, so far as is practicable, safe, without risks to health, and adequate as regards facilities for their welfare at work.

[5] Although the appellant had raised nine grounds of appeal in its petition of appeal, the learned Deputy Public Prosecutor ('DPP') in her submission which I agree that the main issues in this appeal are that:

(i) Whether the appellant had proven beyond reasonable doubt against the respondent; and

(ii) Whether the respondent's defence had rebutted the duty imposed under s. 60 of OSHA on the balance of probabilities.

[6] Currently there are no reported cases in Malaysia pertaining to offences under s. 15(1) of OSHA. Nevertheless I will rely on relevant reported cases under s. 2(1) of the Health and Safety at Work Act 1974 of the United Kingdom and s. 8(1) of the Australia Occupational Health and Safety Act which are in *pari materia* with our s. 15 (1) OSHA. I will also refer to other jurisdiction such as New Zealand, Canada, Hong Kong and others. Although decisions in other jurisdiction are merely persuasive authority but it was followed by most if not all member states of the International Labour Organization which concerned the safety, health and welfare of employees.

[7] First, let me laid down the ingredients of the charge that has to be proved by the prosecution. Based on my reading of the charge, I am of the view that the elements of the offence under s. 15(1) OSHA is as follows:

a) The respondent was an employer of the deceased at the material time;

b) That the deceased being an employee of the respondent was exposed to risk to the health and safety;

c) That the deceased being an employee of the respondent was at work at that material time; and

d) There is a causal nexus between the respondent's breach and the risk to the deceased's safety.

[8] In arriving at the above elements of the offence, I placed reliance to the Australian case of *Inspector John Sibilant v. Royal Automobile Club of Australia Incorporating Imperial Services Club Ltd* [2008] NSWIRComm 87 (28 April 2008) where the elements of offence under s. 8(1) of the Occupational Health and Safety Act 2000 which is in *pari materia* with our s. 15 OSHA has been laid down.

[9] Now let me deal with the first issue. According to the charge against the respondent, it was stated that on 5 October 2010 at 5pm the respondent had failed in its duty to ensure the safety, health and welfare of its workers while at work. Hence, the prosecution must prove that the deceased was at work at the material time.

[10] Section 15(1) OSHA stated that the duty of the employer is to ensure safety, health and welfare at work for his employees. This would mean that the duty of an employer is to ensure the safety, health and welfare of its workers while they are at work and not when they are not working.

[11] Pursuant to the employment contract that was tendered as exh. P9, it is well written at cl. 4 that working hours commence from 6am to 2pm only. DW1 (mandur/supervisor) and DW2 (Assistant Estate Manager) confirmed that the working hours was from 6am to 2pm and thereafter the workers are on their own. DW2 further testified that the company has a standing procedure whereby for all overtime work, there must be a form to be filled up by the employee and must be approved by the company. In this case, there was no such requisition for overtime work.

[12] I hold that the learned DPP's contention in her submission that the workers were working because of the fruits needed to be sent to the mill within 24 hours is merely assumption as there was

no evidence on this before the court. The deceased and other workers had gone on a frolic on his own and without the knowledge of the respondent as they were all not at work.

[13] Since the deceased was not working at the material time and there was no work carried out, I hold that what the deceased did that evening was not an activity that can be described as part of the employer's undertaking as they are free to do whatever they like after the working hours. As such, the respondent cannot be held liable for acts that had happened after the workers or the deceased work hours. The learned SCJ was correct in citing the UK Court of Appeal case of *R v. Gateway Foodmakers Ltd* [1996] EWCA Crim 1786, where the Court of Appeal held that the activity in question must be that can be described as part of the employer's undertaking. The Court of Appeal in this case held as follows:

> "The duty under Section 3 is imposed on the employer himself by reference to a certain kind of activity, namely, the conduct by the employer of his undertaking" (1547B). The question, therefore, (the statutory defence apart) was simply "whether the activity in question can be described as part of the employer's undertaking" (1547H).
>
> There is no reference in section 2(1) to the conduct of the undertaking, which is the basis for liability under Section 3(1), and so it is manifest that the content of the duty under section 2(1) is different from that under section 3(1). But in our judgment it is the same kind of duty: the company, as employer, is liable when the necessary conditions for liability are fulfilled. Having regard to the statutory qualification ("so far as is reasonably practicable"), the interpretation of section 2(1) in this way seems to us to be entirely consistent with the principle identified by Lord Reid in *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153. Parliament can be assumed to have balanced the need for regulation, achieved by making the employer liable, against the injustice of convicting a person who is blameless, hence the statutory defence (see page 169).

[14] Premised on the above authority, I hold that the learned SCJ was correct in finding that at the material time stated in the charge the prosecution had failed to prove beyond reasonable doubt the victim was at work.

[15] Now that I have found that the deceased was not at work at the material time, this will mean that the tractor and the trailer was never used by the deceased as a mode of transportation to his place of work. At the time of the accident at 5pm on that day, the deceased were riding on the tractor and not the trailer. Bear in mind that all witnesses both from the prosecution and the defence had given evidence that the respondent prohibit any worker riding on the tractor except the driver.

[16] Be it as it may it is necessary to determine whether the tractor and the trailer was safe and reasonable to be used in the plantation. The appellant submits that the tractor and trailer provided by the respondent as transportation for the employees to the workplace are unsafe to be used and that the trailer which was pulled by the tractor at Sri Kamusan Estate was used to transport oil palm fruit bunch and was also used to transport workers and was the main transport available at Sri Kamusan estate.

[17] The trailer that was used to transport oil palm fruit bunch and also used for the workers' transportation was not provided with proper seating or canopy as the workers have to sit on the floor of the trailer and this is not in accordance with s. 15 of the Code of Practice on Safety and Health Agriculture issued by the International Labour Organisation (COPSHA-ILO).

[18] Section 15 of COPSHA-ILO also provides that for trailers, to allow passengers to ride on it, it must be equipped with a braking system side panels, secured seating and canopies.

[19] The prosecution also relied on the evidence of the PW6 (officer from the Road Transport Department) and PW7 (officer from Forensic Engineering Division of DOSH of Putrajaya, to support that tractor and trailer are not safe and unsuitable to transport workers in the plantation. However, based on the evidence before me, PW6 and PW7 are not expert witnesses and their evidence is of no assistance to this case. PW6 admitted that he is not specialised in the field of agriculture and he was not in the position to give opinion as to the use of equipments in plantation. PW7 also admitted that he is not an expert in so far as to the use of the tractor and trailer in agriculture to qualify as an expert in that field. PW7 said that the trailer should be

A modified with seating and cover and modified for such use. However, he also said that modified or not, it is still unstable when the trailer is added to the tractor.

[20] Regardless of the evidence of PW6 and PW7, the facts
B remained that DOSH did not issue any notices under s. 48 OSHA to prohibit the use of trailers after the accident happened. Neither did DOSH issue any notices to demand that the trailer be modified to suit for such purposes. Even after the accident, DOSH did not issue any notice directing the respondent to install
C roof, brakes, seat etc on the trailer for the purpose to carry the workers. Being a statutory body, DOSH has the statutory duty under s. 48 of OSHA to issue such notices if DOSH is of the opinion that the trailer is not safe to DOSH satisfaction. By not issuing such important notices, such inference can be gathered
D that the trailer is safe and does not risk the lives of the employees whilst using the trailer.

[21] I must say that DOSH is under a statutory duty to educate the employers and to ensure a safe workplace. DOSH cannot be
E said not to be aware of trailers being used in the plantations in Sabah to ferry workers as well as to be used to transport the crops. In fact, the prosecution through PW6 and PW7 testified that they were aware of this. (see pp. 111 and 124 of the record of appeal). In any event, on the evidence before me, the trailer
F used by the respondent to ferry the workers to workplace was designed with a guard and all workers must sit on the floor of the trailer and this is in fact is allowed by COPSHA-ILO. I also take judicial notice that the International Labour Organization as well as the Safety and Health executive of UK guidelines for
G agriculture allows tractors and trailers to be used to ferry workers but must minimise the risk.

[22] In the final analysis, in view that DOSH did not prohibit or ban the use of the trailer and tractor as a mode of transporting workers before, after the accident and even as of the time of the
H trial in the court below and during the appeal before me, I hold that the prosecution had failed to prove beyond reasonable doubt the tractor and the trailer was not safe to be used to ferry workers in the plantation.

I

[23] Next, I move on to the second issue that is whether the respondent had rebutted the duty imposed under s. 60 of OSHA on the balance of probabilities. At this juncture is it important to determine the issue of burden of proof. Learned DPP submitted that the burden of proof falls on the respondent under s. 60 OSHA once the prosecution proved beyond reasonable doubt certain acts or omission to provide a *prima facie* case. The respondent disagreed and drawn my attention to the cases of:

a) *WorkCover Authority of New South Wales (Inspector Woodington) v. Australand Holding Limited and Sassall Glass & Joinery Pty Limited* [2008] NSWIRComm 153,

b) *Utumapu (Health and Safety Inspector) v. W Crighton & Son Ltd (NZDC Palmerston North)* [2000] NZHSE 14; and

c) *DPP v. PJ Carey (Contractors) Limited* [2011] IECCA 63

all of which were cases which dealt with among others the question of burden of proof. In the case of *Inspector Woodington* cited above, the court held that:

> As in all criminal matters, the nature of the duty imposed does not relieve the prosecution of the necessity for it to prove the employer's failure beyond reasonable doubt: See *State Rail Authority of New South Wales v. Dawson* [1990] 37IR 110 at 120-121 where the Full Bench stated:
>
> > Although S. 15(1) creates an absolute liability on the employer, it is still nevertheless necessary for the informant to prove, according to the criminal standard of beyond reasonable doubt that the employer failed to meet the obligation cast on him by the section.

[24] Hence, premised on the above cases, I am in agreement with the learned counsel for the respondent that the burden of proof is still on the prosecution to prove beyond reasonable doubt and never shift to the respondent.

Moving on, s. 60 of OSHA provides that:

> In any proceedings for an offence under this Act or any regulation made thereunder consisting of a failure to comply with a duty or requirement to do something means to do something, it shall be for the accused to prove that it was not practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.

As to what "practicable" means, s. 3 OSHA provides as follows:

> "Practicable" means practicable having regard to:
>
> (a) the severity of the hazard or risk in question
>
> (b) the state of knowledge about the hazard or risk and any way of removing or mitigating the hazard or risk;
>
> (c) the availability and suitability of ways to remove or mitigate the hazard or risk; and
>
> (d) the costs of removing or mitigating the hazard or risk.

In defending itself, the respondent relied on s. 55 of OSHA where it reads:

> It shall be a defence in any proceeding against a person for an offence under this Act or any regulation made thereunder to satisfy to the Court that the offence was committed without his consent or connivance and that he had exercised all such due diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

[25] The case of *Her Majesty The Queen v. Jamel Metals Inc* [1999] CanLII 12390 SK PC, the court must consider whether the accused had exercised due diligence or taken reasonable precaution to prevent the breached.

[26] The evidence of PW1, PW2, PW5, PW7, DW1 and DW2 shows that the respondent had muster call every morning where all workers were instructed on the safety aspect before they start work and to prioritise the aspect of safety during working hours. There are safety regulations of the respondent which the workers are briefed. Safety sign boards were put around the plantations. All workers were instructed to sit on the floor of the trailed when being ferried to work. In fact, disciplinary actions were taken against workers who breached the rules and regulations on safety. PW2 also testified that the respondent had done all that it can do to prevent such accident (see Q59 at p. 57 record of appeal). The prosecution's own witness PW5, concluded that based on his investigation, the negligence of the deceased workers himself resulting in his death.

[27] By virtue of the evidence adduced by the defence, the learned SCJ was right in holding that the respondent had indeed taken all the reasonable steps and due diligence to ensure the safety of each worker at the plantation and any hazardous foreseeable danger has been taken precaution by the respondent by putting up warning signage at the vicinity.

[28] With these, I conclude that the respondent has rebutted the duty imposed as stated under s. 60 of OSHA.

[29] In the light of the foregoing, I affirm the findings of law and fact of the court below and dismiss this appeal.